(10)

No. 89-5809

In the Supreme Court of the United States

October Term, 1989

Robert Sawyer,
Petitioner

versus

Larry Smith, Interim Warden,
Louisiana State Penitentiary,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE RESPONDENT

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April, 1990

QUESTIONS PRESENTED

I. Whether the decision in Caldwell v. Mississippi, condemning false and misleading prosecutorial arguments to a capital jury concerning the jurors' sentencing responsibility, should be applied retroactively because Caldwell created a "new rule" under the standards of Teague v. Lane and Penry v. Lynaugh and because the Caldwell principle does not qualify under the two exceptions enunciated by the non-retroactivity rule of Teague v. Lane?

II. Whether the prosecutor's remarks to Sawyer's capital sentencing jury were improper under Caldwell v. Mississippi such that Sawyer is entitled to a new sentencing hearing on the ground that his Eighth Amendment rights were violated?

PARTIES TO THE PROCEEDING

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BRIEF OF THE RESPONDENT

STATEMENT OF THE CASE

Petitioner was convicted of first degree murder and sentenced to death on September 19, 1980. His conviction and sentence were affirmed by the Louisiana Supreme Court. See State v. Sawyer, 422 So.2d 95 (La. 1982), reh. denied Nov. 24, 1982. Upon application for certiorari to the United States Supreme Court, the case was remanded for consideration in light of the holding in Zant v. Stephens, 462 U.S. 862 (1983). See Sawyer v. Louisiana, 463 U.S. 1223 (1983). Upon remand, the Louisiana Supreme Court again affirmed the death sentence addressing only the issues relative to Zant. See Sawyer v. State, 442 So.2d 1136 (La. 1983). J.A. 57. A second

application for certiorari to the United States Supreme Court was denied. See Sawyer v. Louisiana, 466 U.S. 931 (1984). Petitioner filed an application for state habeas relief on May 8, 1984, which was denied that day. J.A. 72.

Thereafter, the Louisiana Supreme Court remanded the case for an evidentiary hearing in the trial court. J.A. 73. The matter was submitted on the trial record and affidavits after which the trial court denied the application with written reasons. J.A. 74-86. Again, the Louisiana Supreme Court remanded for an evidentiary hearing which was held on July 25, 1985. The trial court denied the application again giving oral reasons. J.A. 88-92. Relief was further denied by the Louisiana Supreme Court. See Sawyer v. Maggio, 479 So.2d 360, reconsideration denied, 480 So.2d 313 (La. 1985). Lastly, Petitioner applied for federal habeas relief which was denied in an unpublished opinion. J.A. 94-153. Petitioner was then granted a certificate of probable cause and a stay of execution while he appealed to the United States Court of Appeals for the Fifth Circuit which denied his petition on June 30, 1988. See Sawyer v. Butler, 848 F.2d 582 (5th Cir. 1988). J.A. 54. An en banc rehearing was granted on August 25, 1988. After oral argument, the en banc court requested supplemental briefing on three questions concerning this Court's decision in Teague v. Lane. J.A. 212. The En Banc Court issued an opinion on August 15, 1989: a 9-5 decision affirming the district court's dismissal of Sawyer's Writ. Sawyer v. Butler, 881 F.2d 1273 (5th Cir. 1989) (en banc), cert. granted ____ U.S. ____, 110 S.Ct. 835 (1990), vacating in part, Sawyer v. Butler, 848 F.2d 582 (5th Cir. 1988). J.A. 214. This Court granted certiorari on January 16, 1990. J.A. 290.

STATEMENT OF THE FACTS

The following statement of facts is essentially as found in State v. Sawyer, 422 So.2d at 97, 98 (La. 1982) and the trial transcript.

A series of bizarre and frightful events, which led to the death of Fran Arwood, occurred at the residence where defendant was living with Cynthia Shano and Ms. Shano's two young sons. Ms. Arwood was divorced from Ms. Shano's stepbrother, but remained friendly with her and often helped her by taking care of the children. Defendant had lived with Ms. Shano in Texas for several months and had professed an intention to marry her.

On September 28, 1978, Ms. Arwood was staying with Ms. Shano and helping with the children while Ms. Shano's mother was in the hospital. Defendant and Ms. Shano went out for the evening. Defendant returned at about 7:00 o'clock the next morning with Charles Lane, whom defendant had apparently met in a barroom and had invited to the residence for more drinking and talking.

Defendant and Lane continued their drinking while listening to records. At some time during the morning, Ms. Shano left to check on her hospitalized mother. When she returned, she noticed that Ms. Arwood was bleeding from her mouth. Defendant told Ms. Shano that he had struck Ms. Arwood after an argument in which he accused Ms. Arwood of giving some pills to one of the children.

The reasons behind the events that followed are difficult to discern accurately from the record and more difficult to comprehend. However, defendant does not vigorously contest the fact that Ms. Arwood, in his presence was beaten, scalded with boiling water and burned with lighter fluid, or that the ferocity of the attack and the severity of the injuries caused her to die several weeks later without ever regaining consciousness.

After the original altercation during Ms. Shano's absence, defendant and Lane, for some unexplained reason, decided that Ms. Arwood needed a bath because nobody wanted to look [at] her "funky whory ass" that way. When she resisted, defendant kicked her in the back of the head with his shoes which had taps on the ends. Ms. Shano objected, but defendant locked the front door and retained the key, threatening Ms. Shano if she interfered or ever revealed the incident.

Acting in concert, defendant and Lane dragged Ms. Arwood by the hair to the bathroom, stripped her naked, and literally kicked her into the bathtub, where she was subjected to dunking, scalding with hot water (defendant actually left the bathroom to boil the water while Lane kept a watch over Arwood, a period during which he may have raped her). When defendant returned to the bathroom, detergent and the boiling water were poured on Ms. Arwood followed by additional beatings with their fists. A final effort by Ms. Arwood to resist the sadistic actions of her tormentors resulted in defendant kicking her in the chest, with both of his feet while letting out a yell, causing her head to strike either the tub or the adjacent window sill with such force as to render her unconscious. Although she did not regain consciousness, defendant and Lane continued to use her body as the object of their brutality.

Defendant and Lane dragged her from the bathroom into the living room, where they dropped her, face down, onto the floor. While on the floor, defendant walked on her back and Lane kicked her in the ribs. Defendant then beat her with a belt as she lay on the floor. They then placed her on her back on a sofa bed in the living room. As Ms. Shano went to the bathroom, she overheard defendant say to Lane that he (defendant) would show Lane "just how cruel he (defendant) could be". When she reentered the living room, she was struck by the pungent smell of burning flesh. She then discovered that defendant had poured lighter fluid on Ms. Arwood's body

(particularly on her torso and genital area) and had set the lighter fluid afire. Lane told Shano, as he and Sawyer laughed about it, that his penis had been burned when defendant ignited the lighter fluid while he was having intercourse with the (unconscious) victim. Shano then heard Sawyer tell Lane, "Nobody told you to stay inside of her while I told you I would show you how hot pussy can get."

Then, displaying a callous disregard for the helpless (and mortally injured) victim, defendant and Lane continued to lounge about the residence listening to records and discussing the disposition of Ms. Arwood's body. Lane fell asleep next to the beaten and swollen body of the victim

Shortly after noon, Ms. Shano's sister and nephew came to visit. When the nephew knocked insistently, defendant gave Ms. Shano the key to open the door, and she ran screaming to the safety of her relatives. Her excited ravings ('They've killed Fran and they're trying to kill me') were incomprehensible to her nephew and sister until they looked inside and saw the gruesome scene and Ms. Arwood's beaten and blistered body. They also saw defendant sitting with his feet propped up on the edge of the couch.

In the meantime, Ms. Shano called for police and emergency units. When the authorities arrived, they took Lane and defendant to jail, and rushed Ms. Arwood to a hospital, where she subsequently died.

SUMMARY OF ARGUMENT

The Court of Appeal's majority correctly held that Caldwell v. Mississippi is a "new rule" because it was not dictated by this Court's precedent under the standards of Teague v. Lane and Penry v. Lynaugh. The rule in Caldwell "was not dictated by precedent existing at the time the defendant's conviction became final" as restated by this Court in Butler v. McKellar and Saffle v. Parks. The federal cases

prior to Caldwell set standards for the imposition of the death penalty to ensure that it would not be imposed in an arbitrary and capricious manner. However, the particular actions that would be condemned or promoted under an Eighth Amendment analysis were not articulated except on a case by case basis. The federal case law at the time that Sawyer's conviction became final would not have predicted the particular circumstances and actions which Caldwell condemned.

In determining whether or not Caldwell issued a "new rule" under Teague and Penry, it is of no consequence that the Louisiana Supreme Court recognized Caldwell-type violations before 1985, because the Louisiana Supreme Court rested its decisions prior to 1985 on state law and court rules which required it to review a sentencing phase for passion, prejudice and arbitrary factors. There is no substantial reason for this Court to overrule its prior decisions that the availability of a state law claim does not establish a claim under the United States Constitution.

The Fifth Circuit's opinion below should be affirmed as well as its reasoning which established a one step "no-effect" test analysis for a Caldwell issue. In the process of deciding whether or not there is a Caldwell violation, the inquiry should focus on all the facts and circumstances, including the entire trial record. Thus, in the process of determining the existence of a Caldwell error, the Fifth Circuit uses all the ingredients of the Donnelly fundamental fairness analysis. The conclusion that if a Caldwell violation exists then the reviewing court can not say that it had no effect on the jury is a "new rule" of federal constitutional law which would preclude Sawyer from applying it to the facts of his case. In the alternative, if this Court decides that Caldwell merely applied the fundamental fairness analysis of Donnelly to the sentencing phase of a capital trial that application gave a death penalty sentencing hearing a heightened sense of reliability over other sentencing hearings. This heightened sense of reliability for a sentencing hearing is a "new rule" under the Teague and Penry analyses

such that Sawyer would still be precluded from benefitting from the effect of Caldwell.

The Caldwell principle as a "new rule" cannot be applied retroactively under either of the two exceptions enunciated by Teague. Caldwell does not fit under the second exception. The Caldwell rule is a prophylactic rule which is designed to lessen the possibility that the jurors' rested their decision elsewhere. Since it diminishes the risk of unreliability, it is not a "watershed rule" but an enhancement rule, and Sawyer is precluded from relying on the second exception enunciated in Teague.

Robert Sawyer is not entitled to a new sentencing hearing under Caldwell v. Mississippi since Sawyer's death penalty was not imposed by a jury which had been improperly led to believe that the responsibility for determining the appropriateness of death rests elsewhere. Improper argument alone is not a Caldwell violation. The inquiry, under this Court's jurisprudence, must be conducted on the entire record. The record, in this case, includes: (1) individual voir dire where each juror was explicitly told that, if a verdict of first degree murder was returned, the jury would have to decide the sentence which would be either life imprisonment or the death penalty; (2) instructions to the jury that the attorneys' arguments were not evidence; (3) argument by counsel that it would have to decide on what penalty would be imposed; and (4) instructions by the trial court to the jury that it had to decide on the penalty to be imposed.

The alleged violation is subject to a "fundamental fairness" standard of review as set forth in Donnelly v. DeChristoforo, expanded in Darden v. Wainwright and used in Sawyer v. Butler by the en banc court in its analysis. However, should this Court find Caldwell error, the sentence need not be vacated after a harmless error analysis based on previous capital cases: on this record it can be said beyond a

reasonable doubt that the alleged Caldwell comments did not contribute to the sentence chosen by the unanimous jury.

ARGUMENT

I.

THE PRINCIPLE ANNOUNCED IN CALDWELL V. MISSISSIPPI IS A "NEW RULE" OF FEDERAL CONSTITUTIONAL LAW UNDER TEAGUE V. LANE AND CANNOT BE APPLIED TO ROBERT SAWYER ON COLLATERAL REVIEW SINCE IT DOES NOT COME WITHIN THE TWO NARROW EXCEPTIONS ESTABLISHED BY TEAGUE.

A. The Caldwell principle is a "new rule" since it imposes a new obligation under federal constitutional law that was not foreshadowed by precedent.

Robert Sawyer is before this Court on collateral review by a writ of habeas corpus alleging improper prosecutorial comments at the penalty phase of his capital trial in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985). Before addressing the merits of Sawyer's claim, it must first be determined whether the relief sought would create a "new rule" under this Court's holdings in Teague v. Lane, 489 U.S. ____, 109 S.Ct. 1060 (1989) and Penry v. Lynaugh, 489 U.S. ____, 109 S.Ct. 2934 (1989), as further explained in Dugger v. Adams, 489 U.S. ____, 109 S.Ct. 1211 (1989), Saffle v. Parks, ____ U.S. ____, S.Ct. No. 88-1264, decided March 5, 1990, and Butler v. McKellar, ____ U.S. ____, S.Ct. No. 88-6677, decided March 5, 1990. Under the dictates of these cases, if the Caldwell rule is a new rule it will not be applied to the Petitioner on collateral review unless it would fall into one of two narrow exceptions. Saffle v. Parks, supra, slip op., at 3. A new rule, as defined in Teague and Penry and refined in Saffle and Butler v. McKellar, is a rule that "breaks new

ground," "imposes a new obligation on the state or the federal government," or was not "dictated by precedent existing at the time that the defendant's conviction became final." Teague, supra, at ____; Penry, supra, at ____. This Court restated the definition of a new rule in Butler v. McKellar, supra, slip op. at 5, as a decision that announces a new rule "'if the result was not *dictated* by precedent existing at the time the defendant's conviction became final.'"

The Caldwell decision condemns misleading prosecutorial arguments which diminish the jury's sense of responsibility for imposing the death penalty. Since the Caldwell decision does not overrule an earlier holding it does not obviously "break new ground" or "impose a new obligation" that would, if it did, clearly qualify it as a "new rule". It is then necessary to analyze the rule issued in Caldwell under the guidelines of Teague and Penry as reiterated in Butler and Saffle to determine if, in fact, Caldwell issued a new rule of law which would be inapplicable to Sawyer in this case since his conviction on direct appeal was final at least in 1984, if not 1983.

This Court has expressed an interest in maintaining state court convictions in the interest of "leaving concluded litigation in a state of repose." See, Teague, supra at ____; Butler, supra at ____, slip op. at 5. In order to avoid re-adjudicating convictions according to all legal standards in effect when a habeas petition is filed this Court has further determined that it is a better policy, in general, to apply the law prevailing at the time a conviction became final than it is to seek to dispose of habeas cases on the basis of intervening changes in constitutional interpretation. See Teague, supra, at ____. Applying later changes in constitutional interpretations to state cases on federal habeas as a deterrence to state courts would require state judges to "second guess" future federal interpretations. Such guessing would develope a chaotic state jurisprudence. Furthermore, the burden on the system to retry old cases as a result of carte blanche retroactive application of

recent constitutional interpretations would undermine the integrity of state convictions, which should be maintained in the interest of comity. Unless there is a colorable showing of factual innocence, the burden placed on society and the state by retrying old cases justifies the effects of the non-retroactivity of Teague and Penry. Habeas serves a function of deterrence on state courts to apply federal constitutional rules in place at the time of the conviction. In order to perform this deterrence function, it is necessary to apply the federal constitutional standards in place at the time that that conviction became final. Thus, on collateral review, the "new rule" principle validates reasonable, good faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions. Butler, supra, slip op. at 6. This more than adequately ensures the integrity of state court rulings relative to federal constitutional principles.

In order to determine whether or not Caldwell issued a "new rule" it is necessary to consider whether this Eighth Amendment violation was foreshadowed by prior federal cases despite state court decisions which reflected some of the precepts of the Caldwell rule before Caldwell was decided in 1985. This analysis must also consider the interpretation and meaning of Caldwell and the standard of review referred to in that decision.

1. The Caldwell principle is a "new rule" since it was not foreshadowed by prior federal cases.

In Caldwell v. Mississippi, 472 U.S. 320, 329 (1985), Justice Marshall, speaking for the Court, concluded that "it is constitutionally impermissibly to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." The Caldwell court, in further narrowing the general rule it announced, said that improper, inaccurate or misleading

remarks by the prosecutor, if left uncorrected, could diminish the jury's sense of responsibility in violation of the Eighth Amendment. This particular rule was in no way foreshadowed by the prior federal cases on the death penalty which placed limits on the imposition of capital punishment as rooted in a concern that the sentencing process should facilitate the responsible and reliable exercise of sentencing discretion. See e.g., Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978); Gardner v. Florida, 430 U.S. 349 (1977); Woodson v. North Carolina, 428 U.S. 280 (1976).

A review of the capital sentencing limitations imposed by this Court since Furman v. Georgia, 408 U.S. 238 (1972), reflects that this Court was initially concerned with the procedures by which the state imposed the death sentence as opposed to the substantive factors laid before the jury as a basis for imposing death. The directive from this Court in Furman was that, because of the uniqueness of the death penalty, it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner. In 1976, the Supreme Court reviewed the capital sentencing scheme of five states to determine whether those schemes had cured the constitutional defects identified in Furman.[1] The procedural safeguards as dictated by this Court were to direct and limit the jury's discretion so as to minimize the risk of wholly arbitrary and capricious action. Substantive limitations on the particular factors that a capital sentencing jury may consider in determining whether death is appropriate were delineated in cases decided since 1976, e.g., Gregg v. Georgia, 428 U.S. 153 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Lockett v. Ohio, 438 U.S. 586 (1978); Gardner v. Florida, 430

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[1]Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 328 (1976).

U.S. 349 (1977); California v. Ramos, 463 U.S. 992 (1983). Contrary to Sawyer's assertion, these cases determined rules for capital sentencing which did not predict the Caldwell rule.

The federal cases prior to Caldwell clearly held that the Eighth Amendment required a heightened level of reliability in the sentencing decision. The particular actions that would be condemned under an Eighth Amendment analysis were not articulated except on a case by case method. The Caldwell determination that diminishing a jury's sense of responsibility violated the Eighth Amendment was a particular limit imposed by this Court in 1985, that had not been delineated by prior cases. In fact, a reference to of appellate review could have been interpreted by a state court to be appropriate under the Eighth Amendment considerations after California v. Ramos, supra, was decided in 1983.

In Ramos, this Court concluded that there was no constitutional defect in the instructions regarding the governor's power to commute a sentence of life without possibility of parole under the Eighth and Fourteenth Amendments. In reaching its conclusion this Court noted that once a defendant falls within the legislatively defined category of persons eligible for the death penalty the jury is free to consider a myriad of factors to determine whether death is the appropriate punishment. Although the jury's choice between life and death must be individualized, the constitution does not require the jury to ignore other possible factors in the process of selecting those defendants who will actually be sentenced to death. See e.g. Zant v. Stephens, 462 U.S. 862, 878 (1983) and California v. Ramos, supra, at 1008. In short, despite the lower court's condemnation of the instructions regarding the governor's powers, this Court approved of those instructions as being a "substantive factor to be presented for the sentencing jury's consideration." Ramos, supra, at 1013.

The rule issued in Caldwell as a factor that might lead to arbitrary and capricious sentencing patterns condemned in

Furman was not specifically foreshadowed. Therefore, it represented a new rule of law when announced in Caldwell v. Mississippi. Furthermore, the more specific application of this principle in reference to particular prosecutorial statements which refer to appellate review, was also not foreshadowed by prior federal cases. In fact, the decision in Ramos could have led a state to believe that appropriate reference to appellate review would contribute to a reasoned decision by the jury in a death penalty phase of a trial. Since states that allow imposition of the death penalty have mandatory appellate review of those decisions, references to appellate review could be an accurate statement of the law, although if not fully explained it could be misleading. These possible fluctuations in interpretations, on retrospect, form another basis to maintain a non-retroactivity policy and also to conclude that Caldwell is a "new rule".

The state's position that Caldwell issued a "new rule" of law is further supported by this Court's most recent decisions in Saffle v. Parks, ____ U.S. ____, S.Ct. No. 88-1264, decided March 5, 1990, and Butler v. McKellar, ____ U.S. ____, S.Ct. No. 88-6677, decided March 5, 1990. In Saffle the petitioner urged that an instruction delivered in the penalty phase of the trial, telling the jury to avoid any influence of sympathy, violated the Eighth Amendment under Teague and Penry. In reaching its decision that petitioner urged a "new rule" of law, this Court considered Lockett v. Ohio,[2] supra, and Eddings v. Oklahoma,[3] supra, determining that neither spoke directly, if at

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[2]The plurality in Lockett decided that an Ohio death penalty statute that limited the jury's consideration to specified mitigating circumstances violated the constitutional requirement of individualized sentencing in capital cases.

[3]Eddings determined that a sentencing judge's refusal, as a matter of law, to consider mitigating evidence presented by a capital defendant concerning his family history and upbringing was

all, to the issue presented here since Parks was asking the court to create a rule relating, not to what mitigating evidence the jury must be permitted to consider, but to how it must consider the mitigating evidence. Furthermore, the court refused to find assistance in California v. Brown, 479 U.S. 538 (1987),[4] since a reasonable juror would interpret the instruction to ignore mere sympathy "as an admonition to ignore emotional responses that are not rooted in the aggravating and mitigating evidence." It was not unconstitutional for a state to expect a reasoned moral response and prohibit juries from basing their decisions on factors not presented at the trial. Saffle, 489 U.S. at ____, slip op. at 9.

In further explaining the definition of a "new rule" this Court, in Butler, declared that the rule of Arizona v. Roberson, 486 U.S. 675 (1988), is a "new rule" of law since its result was not dictated by precedent existing at the time defendant's conviction became final. It rejected the argument that Edwards v. Arizona, 451 U.S. 477 (1981), dictated the result in Roberson since Roberson would be merely an extension of the prophylactic rule in Edwards which requires the police, during continuous custody, to refrain from all further questioning once an accused invokes his right to counsel. The rule in Roberson which extended the Edwards rule to the context of a separate investigation is a new rule of law and not applicable to Butler on collateral review. By analogy, the rule in Caldwell which is a specific application of the rule that capital sentencing schemes need a heightened sense of reliability was not predicted by prior federal cases.

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constitutional error.

[4]It was held that an instruction telling the jury not to be swayed by "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feelings," during the sentencing phase did not violate the Eighth Amendment.

Since this Court, in reaching its conclusions in Butler and Saffle, relied heavily on the law prevailing at the time that the petitioner's conviction became final, it is relevant here to consider what federal law was in effect at the time that Sawyer's conviction became final. Sawyer's writ for certiorari was remanded for further consideration in light of Zant v. Stephens, supra, by United States Supreme Court from direct appeal on July 6, 1983.[5] The federal cases decided by this date did not predict the outcome of Caldwell. In 1985, there was language which addressed the discretion of the jury and limited its role to prevent the arbitrary and capricious imposition of the death penalty. However, there was no directive that foreshadowed the "new rule" of Caldwell.

As Justice Brennan said in his dissent in Butler, in regard to adjudicating in reference to prevailing law at the time of the conviction, "rather, such adjudication requires a judge to evaluate both the content of previously enunciated legal rules and the breath of their application. A judge must thereby discern whether the principles applied to specific patterns in prior cases fairly extend to govern analogous factual patterns." Butler v. McKellar, supra, slip op. at 7 of dissent. In reviewing Sawyer's claims under the prevailing law at the time that his conviction became final, it is clear that the principles regarding a death penalty hearing at that time, when applied to his specific facts, did not predict the outcome of Caldwell. At that time, the state court knew that the jury's discretion could not

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[5] Petitioner argues that his appeal was final for Teague-Penry purposes on April 2, 1984. But that date is when the United States Supreme Court denied certiorari relative to the Zant v. Stephens analysis. Sawyer's appeal was final for all other issues when this Court remanded his case to the Louisiana Supreme Court on July 6, 1983, for review under Zant. At this time review of other issues ceased and further review continued relative to Zant. The precedent existing at the time Sawyer's conviction became final would be cases existing prior to July 6, 1983.

be unbridled; that the jury's discretion could be limited by aggravating circumstances; that the jury's consideration of any and all mitigating circumstances could not be limited; and that the jury could not hear alleged false or misleading facts in regard to the defendant that he had not had the opportunity to explain or deny. Although by the time Sawyer's conviction became final it had been established that inaccurate and/or misleading prosecutorial remarks that were deemed improper at the guilt/innocence phase of the trial would be reviewed under the fundamental fairness standard of due process,[6] the state could not have predicted that this Court would have applied those same standards to a penalty phase of a capital trial. Nor could the state courts have narrowed that rule as a violation of the Eighth Amendment. Thus, as established by the majority in Butler, the Caldwell rule is a "new rule" since the prevailing law at the time that Sawyer's conviction became final would not have dictated the result under the Eighth Amendment as promulgated by Caldwell.

2 *Although the Caldwell principle was reflected in prior state court decisions, state law does not provide a basis for determination of a "new rule" under federal constitutional law.*

The Louisiana Supreme Court is mandated to review every death sentence for excessiveness by Louisiana Code of Criminal Procedure Article 905.9., (Appendix A-1), and Louisiana Supreme Court Rule 28, (Appendix A-1). In particular, under Rule 28, the Louisiana Supreme Court is to consider the following three factors when reviewing a death sentence:

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[6]See, Donnelly v. DeChristoforo, 416 U.S. 637 (1974).

a) Whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factors, and

b) Whether the evidence supports the jury's finding of a statutory aggravating circumstance, and

c) Whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Even absent a contemporaneous objection relative to arbitrary comments, the court will consider a potential error because of the possibility of prejudicial influence on the jury's recommendation of death. State v. Knighton, 436 So.2d 1141, 1157 (La. 1983), cert. denied 465 U.S. 1051 (1984); State v. Narcisse, 426 So.2d 118 (La. 1983), cert. denied 464 U.S. 865 (1983). Furthermore, the Louisiana Supreme Court has continued to reiterate that any prosecutor who refers to appellate review of the death sentence treads dangerously in the area of reversible error. State v. Knighton, supra; State v. Berry, 391 So.2d 406 (La. 1980), cert. denied 451 U.S. 1010 (1981).

The Louisiana Supreme Court considered the issue of prosecutorial reference to appellate review as early as 1980, in State v. Berry,[7] supra. Thereafter, when it considered prosecutorial remarks at the sentencing phase, the Louisiana Supreme Court affirmed the death sentence when it found that the remark was so brief or innocuous that it would not reasonably induce a jury to believe that its responsibility was lessened by appellate review. State v. Jones, 474 So.2d 919

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[7]In Berry, it was determined that the prosecutor's reference to capital sentence review was improper but did not diminish the jury's sense of responsibility.

(La. 1985), cert denied 476 U.S. 1178 (1986); State v. Knighton, supra, State v. Moore, 414 So.2d 340 (La. 1982), cert. denied 463 U.S. 1214 (1983); State v. Mattheson, 407 So.2d 1150 (La. 1981), cert. denied 463 U.S. 1229 (1983); State v. Monroe, 397 So.2d 1258 (La. 1981), cert. denied 463 U.S. 1229 (1983); State v. Berry, supra. These cases were reviewed and affirmed under state law.

When the Louisiana Supreme Court found that the prosecutor's argument conveyed the message that the jury's responsibility was lessened by information that its decision was not the final one, or contained inaccurate or misleading information, it determined that the defendant was deprived of a fair trial in the sentencing phase and required that the death penalty be vacated. State v. Willie, 410 So.2d 1019 (La. 1982), cert. denied 465 U.S. 1051 (1984); State v. Robinson, 421 So.2d 229 (La. 1982).

It is clear from a review of these cases that the Louisiana Supreme Court rested its decisions on the state law which mandates that it review the sentencing phase of the trial to determine whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factors. Furthermore, the court will review the penalty phase for the possibility of prejudicial influence on the jury's recommendation of death absent a contemporaneous objection relative to the comment. The Louisiana Supreme Court did not base its rulings on violations of the Eighth and Fourteenth Amendments. Since states are free to broaden the rights of defendants, the Louisiana Supreme Court's interpretation of its own rules and statutes in no way indicates that it rested its jurisprudence on federal interpretation of the Eighth and Fourteenth Amendments.

This Court clearly stated in Dugger v. Adams, 489 U.S. ____, 109 S.Ct. 1211 (1989), that the availability of a claim under state law does not of itself establish a claim that was available under the United States Constitution. Furthermore,

"mere errors of state law are not the concern of this Court unless they rise for some other reason to the level of a denial of rights protected by the United States Constitution." Barclay v. Florida, 463 U.S. 939, 957-958 (1983). Petitioner's claim was reviewed and affirmed by the Louisiana Supreme Court under state law and its own Rule 28. Despite Petitioner's citation of numerous cases from other states to support his view that those states regarded Caldwell as a predictable development in Eighth Amendment law, many states, such as Louisiana, did not recognize a Caldwell-type violation as an infringement on the Eighth Amendment. Furthermore, many of the cases cited deal with improper comments by the trial judge which is a different issue than here. To say that a constitutional rule at the federal level could be predicted by the variety of jurisprudential developments on the state level from courts in fifty different states is ludicrous. Substantial injustice would occur if this Court decides that state law, developed in fifty individual states, could be a basis for predicting the final outcome by the United States Supreme Court on federal constitutional issues. There is absolutely no valid reason to reverse this Court's determination that a claim under state law does not of itself establish a claim that was available under the United States Constitution.

The Louisiana Supreme Court in State ex rel Busby v. Butler, 538 So.2d 164, 173 (La. 1988), refused to reexamine this same issue determining that Caldwell did not change its previous case law. Under its own court rule, the Louisiana court had chosen to extend more safeguards to defendants under the then current federal constitutional jurisprudence before Caldwell. Thus, Louisiana's recognition of improper prosecutorial argument as a matter of state law cannot be used to say that Louisiana recognized a Caldwell rule restricted by the Eighth and Fourteenth Amendments.

It is significant to look at how the Louisiana Supreme Court reviewed Petitioner's capital sentencing phase for passion, prejudice, or other arbitrary factors. In the process of

reviewing Petitioner's penalty phase, that court, under Rule 28, reviewed several factors at the sentencing phase despite the lack of a contemporaneous objection. The court considered the affect on the jury of the district attorney's brief reference to the possibility of pardon and determined, that in the context of the entire argument, the prosecutor's responsive remark neither deflected the jury's attention from the ultimate significance and finality of the penalty recommendation, nor misguided the jury's sentencing discretion by the introduction of inappropriate considerations. State v. Sawyer, 422 So.2d 95, 104 (La. 1982), reh. denied Nov. 24, 1982. See, J.A. 23. The court further noted that the prosecutor improperly commented on a co-defendant's conviction and sentence because counsel's argument went beyond the record, but since there was a strong admonition by the trial court, there was no prejudice. The court continued its review of Sawyer's penalty phase by considering the excessiveness of the sentence and concluded that the jury's recommendation was not reached arbitrarily, was not based on improper considerations, and that the circumstances warranted the imposition of the maximum penalty possible. The Louisiana Supreme Court did not specifically address the prosecutor's references to appellate courts or judges nor his use of the word "recommend" at issue herein. The Louisiana Supreme Court reviewed Sawyer's penalty phase for arbitrary factors in 1982, the same year that it reversed and vacated two other death penalties. See e.g., State v. Willie, 410 So.2d 1019, 1033 (La. 1982), cert. denied 465 U.S. 1051 (1984); State v. Robinson, 421 So.2d 229, 233-234 (La. 1982). Clearly the Louisiana Supreme Court did not find that the remarks now complained of violated its rule to review the penalty phase for arbitrary factors which misdirect the jury's sentencing discretion. That court's determination in this instance should be given great weight even under Petitioner's argument, since Petitioner in fact urges the Court to believe that the Louisiana Supreme Court was interpreting constitutional violations of Eighth Amendment magnitude.

3. *Regardless of the standard of review for a Caldwell analysis, whether it is the "no effect" of Sawyer v. Butler or the "fundamental fairness" of Darden v. Wainwright, the principle announced was a "new rule" within the meaning of Teague v. Lane.*

"No Effect" Test

The Fifth Circuit in its *en banc* opinion Sawyer v. Butler, 881 F.2d 1273 (5th Cir. 1989) (en banc), cert. granted ____ U.S. ____, 110 S.Ct. 835 (1990), vacating in part Sawyer v. Butler, 848 F.2d 582 (5th Cir. 1988), determined that Sawyer was procedurally barred from using the rule of Caldwell since Caldwell issued a "new rule" of law under the meaning of Teague v. Lane and Penry v. Lynaugh. As a basis for its decision that Caldwell issued a "new rule" of law the Fifth Circuit determined that Caldwell established a single analysis for the existence of a Caldwell error and its effect on the jury which resulted in a "no effect" test. The *en banc* court said that Caldwell instructs that if the state seeks "to minimize the jury's sense of responsibility for determining the appropriateness of death," and "we can not say that this effort had no effect on the sentencing decision," then "that decision does not meet the standard of reliability that the Eighth Amendment requires." Caldwell, 472 U.S. at 341; Sawyer v. Butler, 881 F.2d, at 1285. The Fifth Circuit concluded that Caldwell must be read in light of McGautha v. California, 402 U.S. 183 (1971), which places at the core of the definition of Caldwell that the comment diminishes the responsibility of the jury by misdescribing its role under state law. The Fifth Circuit reasoned that once it is accepted that a death sentence by a jury with such a diminished sense of responsibility is "fundamentally incompatible with the Eighth Amendment requirement that the jury make an individualized decision that death is the appropriate punishment in a specific case" it is apparent that the Donnelly issue of fundamental fairness is

subsumed in the threshold question of whether there was Caldwell error. Sawyer v. Butler, 881 F.2d, at 1285.

The en banc court appropriately turned to the question of how an appellate court would define a Caldwell error. As part of the ingredients of the definition of a Caldwell error the court concluded that the inquiry is whether, under all facts and circumstances, including the entire trial record, the state has misled the jury regarding its role, under state law, to believe that the responsibility for determining the appropriateness of defendant's death rests elsewhere. Sawyer v. Butler, 881 F.2d, at 1286. This definition inevitably requires a case by case analysis which would include all of the ingredients in the fundamental fairness standard used by Donnelly.

The Fifth Circuit concluded that Caldwell established a "no effect" test such that if a Caldwell error is determined then the sentence must be vacated as the loss of a fundamental right which outweighs any other practical consideration. The Sawyer court recognized that the doctrine of a plain error as applied to the sentencing phase of a capital case was a clear break with the past and not foreshadowed by prior case law. Thus the rule issued by Caldwell is a "new rule" of law for purposes of Teague v. Lane and Penry v. Lynaugh and Sawyer is prohibited from applying it to his case.

The State urges this Court to sanction the Fifth Circuit's opinion and reasoning in determining that the Caldwell inquiry is a single analysis which entwines the totality of the trial, the remarks themselves, the judge's reaction and comments. If it is determined that a jury's sense of responsibility for determining the death sentence is diminished, it is most difficult to determine the quantity of the diminution and, thus, the "no effect" test as established by the Fifth Circuit is a rational application of Caldwell. That is, in order to arrive at the conclusion that there, in fact, was a Caldwell error the court proposes that the ingredients in the fundamental fairness analysis should be used to so determine.

Lastly, the Fifth Circuit concluded that if Sawyer were able to show actual prejudice he would be able to proceed under the more general fundamental fairness standard of Donnelly v. DeChristoforo, 416 U.S. 637 (1974). Although Sawyer did not contend that such prejudice existed the Fifth Circuit, after a thorough review of the record, declared that none existed. Sawyer, at 1294. Thus under the Fifth Circuit's analysis, since Louisiana rejected Sawyer's claim and Sawyer has no federal habeas claim without Caldwell, the conviction and sentence are appropriately affirmed. This Court should affirm the opinion below.

In the alternative, if this Court rejects the Fifth Circuit's reasoning then the appropriate analysis for alleged improper prosecutorial remarks is the fundamental fairness analysis of Donnelly v. DeChristoforo and Darden v. Wainwright, 477 U.S. 168 (1986).

Fundamental Fairness Standard of Review

After the decision in Caldwell, this Court reviewed prosecutorial argument in the guilt/innocence phase of a capital trial in Darden v. Wainwright, 477 U.S. 168 (1986). A majority of this Court concluded that although the prosecutor made comments that were undoubtedly improper, the comments did not so infect the trial with unfairness as to make the resulting conviction a denial of due process. Since Darden was a case before this Court on writ of habeas corpus the majority noted that the standard of review was "the narrow one of due process, and not the broad exercise of supervisory power." Donnelly v. DeChristoforo, 416 U.S. at 642. But the Darden opinion does not cite Caldwell v. Mississippi and does not provide strict guidance to the application of Caldwell to Sawyer's case. The main difference is that Caldwell and Sawyer are concerned with prosecutorial comments at the penalty phase of the capital trial.

The Caldwell opinion used a fundamental fairness analysis to determine that the prosecutor's remarks were in fact improper and then declared that, since it could not be certain that the remarks had no effect on the jury such that its sense of responsibility for imposing the death penalty was diminished, the sentencing phase had to be vacated. Specifically Caldwell v. Mississippi raised the standards for a sentencing hearing in a capital case above the standards of a regular sentencing hearing by more clearly defining the parameters for the capital sentencing phase. States which impose death penalties do it in a variety of ways and Caldwell clearly defined that a penalty phase of a capital case required a heightened sense of reliability over other sentencing hearings in criminal cases. This Court's determination that death cases require a heightened sense of reliability was finally specifically applied to the penalty phase of a capital trial by Caldwell.

If this Court determines that the standard of review for improper prosecutorial comments at the penalty phase of a capital trial is the fundamental fairness test then the Caldwell rule is a "new rule" of law since it raises the sentencing phase in a capital trial to the constitutional levels not required by other sentencing hearings. Holding otherwise would place this Court's standards for review in the guilt/innocence phase of a capital trial, as in Darden, in confusion with the standards in the penalty phase of a capital sentencing hearing in light of prior cases that have set the standards of reliability in death cases.

The issues in the sentencing phase of any criminal proceeding are different from the guilt/innocence phase since the character of the individual, the seriousness of the crime, and the appropriateness of a sentence are relevant. In order to determine these factors, evidence is allowed at a sentencing hearing which would not ordinarily be allowed at the guilt/innocence phase of the trial. Other concerns are allowed in the sentencing hearing such as future dangerousness and prior crimes which would not be determinative of the guilt or

innocence of the defendant and would only mislead the jury to a guilty verdict based on prior activity. But when the sentencing hearing exposes a defendant to death, that sentencing hearing deserves a heightened sense of reliability unlike other sentencing hearings. Certainly the penalty phase of a capital case should not be elevated in reliability above the guilt/innocence phase. This would defy one's sense of justice since it is the initial guilt/innocence phase which determines whether or not a defendant faces a sentencing hearing. Caldwell merely refers back to Donnelly to apply the same scrutiny for prosecutorial remarks in the guilt/innocence phase as the sentencing phase of a death case.

Despite which standard of review is determined as appropriate in a capital case, under the Caldwell "no effect" test or the "fundamental fairness" Donnelly test, the Caldwell rule remains a "new rule" of law which would procedurally bar Sawyer from addressing the merits of his issue.

4. The determination that the Caldwell principle is a "new rule" under Teague v. Lane does not conflict with the outcome in Dugger v. Adams that a Caldwell issue does not provide "cause" for abuse of the writ purposes.

A conclusion that Caldwell issued a "new rule" of law, at first blush, seems to contradict the holding of this Court in Dugger v. Adams, 489 U.S. ____, 109 S.Ct. 1211 (1989), that Caldwell does not provide "cause" for respondent's procedural default. The majority opinion itself in Dugger resolved the apparent conflict by reiterating the definition of a Caldwell claim. When a Caldwell issue is the subject of a procedural default review then the review must turn on the principles established by this Court's prior opinions resolving procedural default issues.

In resolving the issue in Dugger, this Court stated that under Caldwell, only certain types of comments--those that misled the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible for the sentencing decision--are relevant. Dugger v. Adams, 489 U.S. at ____, 109 S.Ct. at 1215. Justice White further explained, in his majority opinion, that "to establish a Caldwell violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." Dugger, 489 U.S. at ___, 109 S.Ct. at 1215. Since an essential element of a Caldwell claim is the misstatement of local law, then, if petitioner fails to address a claim available under state law, though not yet available under federal law, he has no "cause" for his procedural default in the federal courts.

This Court has repeatedly stated that the availability of a claim under state law does not of itself establish that a claim was available under the United States Constitution. Dugger v. Adams, supra, 109 S.Ct. at 1216. Although the rule issued by the Caldwell decision is a "new rule" under federal constitutional law, since it was available under state law, it does not provide cause for a defendant to fail to raise that claim in state court review. And, as the Dugger majority pointed out, the subsequent available federal claim does not excuse the procedural default. This conclusion reconciles the fact that Caldwell is a "new rule" of law as a federal claim and yet does not provide cause for procedural default since a key element of a Caldwell issue is that the improper remarks/instructions were objectionable under state law. Dugger basically answered the inquiry of whether or not Caldwell issued a "new rule" when it failed to recognize Caldwell's availability as a Federal claim to Adams. Had Caldwell been foreshadowed by Federal cases as a viable claim the Dugger court would not have had to reach the issue regarding state law and state procedural bar.

B. The Caldwell principle cannot be retroactively applied since it does not qualify under the two exceptions announced in Teague v. Lane and Penry v. Lynaugh.

This Court held in Penry v. Lynaugh, 492 U.S. ____, 109 S.Ct. 2934 (1989), and repeated this holding in Saffle v. Parks, ____ U.S. ____, S.Ct. No. 88-1264 (1990) slip op., at 1, that a new rule of constitutional law will not be applied in cases on collateral review unless the rule comes within one of the two narrow exceptions. This limitation on the proper exercise of habeas corpus jurisdiction applies to capital and non-capital cases. Since Sawyer's capital conviction became final before Caldwell was decided in 1985, he is procedurally barred from the application of Caldwell's "new rule" unless the rule fits within one of the two exceptions set forth in Teague.

Clearly Sawyer cannot make use of the first exception. The first exception permits the retroactive application of a "new rule" if the rule places a class of private conduct beyond the power of the state to proscribe, see Teague, 489 U.S. at ____, or addresses a "substantive categorical guarantee accorded by the constitution," such as a rule "prohibiting a certain category of punishment for a class of defendants because of their status or offense." Penry, 492 U.S., at ____; Saffle v. Parks, supra, at ____, slip op. at 10. Since Sawyer can not contend that the conduct for which he was charged is constitutionally privileged, or that he is among a class of persons protected against execution, his Caldwell claim does not qualify for the first exception under Teague.

This Court has clearly restated the definition of the second exception as "watershed rules of criminal procedure" implicating the fundamental fairness and accuracy of the criminal proceedings. Butler, supra, at ____ ,slip op., at 8-9; Saffle v. Parks, supra, at ____, slip op., at 10. The objectives of fairness and accuracy are central to the theme of "watershed

rules". Stated another way, "watershed rules" are those rules that are essential to obtaining a reliable verdict that guarantees the fairness and accuracy of the proceeding. In considering which rules would be watershed rules, Justice O'Connor quoted in Teague v. Lane, 489 U.S., at ____, "we are also of the view that such rules are 'best illustrated by recalling the classic grounds for the issuance of writ of habeas corpus--that the proceeding was dominated by mob violence; that the prosecutor knowingly made use of perjured testimony; or that the conviction was based on a confession extorted from the defendant by brutal methods.' Rose v. Lundy, [cite omitted]." Justice Kennedy further illustrated the definition by citing Gideon v. Wainwright, 372 U.S. 335 (1963), which held that a defendant has the right to be represented by counsel in all criminal trials for serious offenses, to illustrate the type of rule coming within the exception. Saffle v. Parks, supra, at ____, slip op., at 10. These few examples lead us to inquire as to the nature of the "watershed rules of criminal procedure" which would be applicable to the sentencing phase of a capital trial.

The finality of death as a punishment has promoted the development of the jurisprudence to require that the proceedings in which a defendant is exposed to the penalty of death project a heightened sense of reliability such that the sentence of death is the appropriate penalty for a particular defendant and his particular crime. This heightened sense of reliability has elevated capital cases above the ordinary sentencing hearing. In other words, the reliability of the determination that death is the appropriate sentence for a particular defendant must be supported by the fairness and accuracy of the proceeding. In Furman v. Georgia, 408 U.S. 238 (1972), this Court determined that because of the uniqueness of the death penalty, it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner. Thereafter, this Court has continued to refine the rules for insuring that the death penalty not be imposed in an arbitrary or capricious manner. In Woodson v. North Carolina, supra,

this Court held a mandatory death penalty unconstitutional. A further refinement is that the sentencing phase should be focused on the particularized circumstances of the individual offense and the individual defendant before a jury can impose a sentence of death. Gregg v. Georgia, supra. Moreover, the sentencer's discretion must be narrowed and channeled by clear and objective standards that provide specific and detailed guidance. Godfrey v. Georgia, 446 U.S. 420 (1980). A defendant has a right to refute any information which the state presents to the sentencing jury. Gardner v. Florida, supra.

The rule issued by Caldwell that a prosecutor's remarks should not diminish a juror's sense of responsibility is not the type of rule that affects the reliability of the sentencing determination in an *immediate* way. In other words, it is necessary that the sentencing determination be reliable. To this end, Gardner v. Florida, supra, directly insures the reliability of the sentencing determination by insisting that the defendant have the right to refute any information that the state may produce. But the rule issued by Caldwell is designed to reduce the risk that the jury's decision was arbitrary and/or capricious. See, Butler v. McKellar, supra. The Caldwell rule is a prophylactic rule which is designed to lessen the possibility that the jury rested its decision elsewhere. Since there is no way of knowing whether a jury is affected by certain information the sentencing hearing must be governed by certain rules which will reduce the risk of an unreliable verdict. Rules which reduce the risk of unreliability are enhancement rules and not core rules that would ensure the reliability of criminal proceedings.

Caldwell condemns the prosecutor's reference to appellate review and misleading or inaccurate statements of state law based on a risk that the jury would be misled. And, further, based on an unreliable risk that the jury would not render a verdict that was based on a realization that it was the sentencer in the case. Although the Caldwell rule is designed to reduce the risk of an unreliable verdict it is not essential to

getting a reliable verdict. A "watershed rule" for the penalty phase of a capital trial is a rule that is essential to a reliable verdict, not a rule, like Caldwell, that only reduces the risk of unreliability.

One of the serious concerns at the core of the Caldwell rule is that the misleading or inaccurate information would be communicated to the jury which would form the basis of its decision for a sentence of death. Since it is impossible to second guess what information a juror brings to the courtroom with him, it seems that it would be in the best interest of an accurate and reliable sentencing determination that the jurors be informed correctly regarding appellate review. In today's rapid communication society, it is unlikely that jurors have not heard reference to convictions which were overturned by appellate courts. They certainly bring an awareness of appellate review to the jury room. If the concern is misinformation then perhaps we should consider that telling a jury something that is accurate is better than continuing its misconceptions. The issue should not be telling jurors something accurate versus telling them something inaccurate.

Nevertheless, the "new rule" issued by Caldwell is an enhancement of "watershed rules" of criminal procedure that the sentencing determination be reliable. It is not a bedrock procedural element that goes to the core of the accuracy of the sentencing proceeding itself since it merely reduces the risk of an unreliable verdict. As such, the Caldwell rule does not qualify as an exception under Teague and is thus unavailable to Petitioner's claim.

II.

THE PROSECUTOR'S REMARKS TO SAWYER'S CAPITAL SENTENCING JURY WERE NOT IMPROPER OR MISLEADING UNDER CALDWELL V. MISSISSIPPI AND THE EIGHTH AMENDMENT, AND SAWYER IS NOT ENTITLED TO A NEW SENTENCING HEARING.

A. Since the Prosecutor's remarks were not misleading under Caldwell, when reviewed within the entire trial record, Sawyer is not entitled to a new sentencing hearing.

Robert Sawyer asks this Court to vacate his death sentence on the grounds that his prosecutor violated the holding of Caldwell v. Mississippi, supra. In brief, he claims that he is entitled to this relief because ". . . false or misleading information about the non-finality of a death verdict has been communicated to the sentencer" (Brief. 44, n. 15) and because the prosecutor engaged in "bad argument." (Id.. 50). These bases, however, do not establish a Caldwell violation. Caldwell, at 472 U.S. 328, 329, held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." Thus, the pivotal question is not whether false or misleading information has been communicated to the jury or whether the prosecutor engaged in bad argument, but is, instead, whether the jury has in fact been misled. That this is the proper focus for the inquiry is supported by Darden v. Wainwright, supra: it is not enough that comments are improper, undesirable or universally condemned. The relevant question is whether the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. The en banc court below correctly recognized that the inquiry is whether the state has misled the jury regarding its role under

state law to believe that the responsibility for determining the appropriateness of defendant's death rests elsewhere.

Sawyer recognizes this inquiry. His recognition, however, deems this as one of several factors which may constitute a Caldwell violation. The inquiry as to whether the jury has been misled must necessarily focus on the entire record. This contextual review is not precluded by Caldwell despite Sawyer's contrary representations. (Brief, 54). Indeed, such a review is approved by this Court. "The principle that prosecutorial comment must be examined in context is illustrated by our treatment of a Fifth Amendment claim in Lockett v. Ohio, 438 U.S. 586 (1978)." United States v. Robinson, 485 U.S. ____, 108 S.Ct. 864 (1988). Although Robinson was not a capital case, Lockett was. Just recently this Court, in a capital case concerning a challenged jury instruction and prosecutorial argument in the penalty phase, stated that differences among jurors' "interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial . . . ." Boyde v. California, ____ U.S. ____, 58 U.S.LW. 4301 (No. 88-6613, March 5, 1990) (emphasis added). This pronouncement, according to Boyde, is equally applicable to argument. Id., 4305. This Court has also stated, in a non-capital case, that a prosecutor's statements "must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial." United States v. Young, 470 U.S. 1 (1985). The Fifth Circuit (en banc) below, 881 F.2d at 1286, acknowledged that the inquiry must focus on the entire record:

> We conclude that the inquiry is whether under all facts and circumstances, including the entire trial record, the state has misled the jury regarding its role under state law to believe that the responsibility for determining the appropriateness of defendant's death rests elsewhere.

It is, therefore, necessary and appropriate that an examination of the entire proceedings be conducted to conclude whether or not a Caldwell error occurred.

The trial began, of course, with jury selection. Each prospective juror was questioned separately. Each juror, therefore, was the sole focus of the questions and comments; no prospective juror could hide in the crowd. Each of the twelve jurors was told that a jury was being selected for a first degree murder trial and that, should Sawyer be found guilty as charged, the jury would have to decide on his sentence. The sentence would be life imprisonment or death by electrocution. Typical of the accurate information imparted to each juror individually was that related to juror Elm Wood:[8]

> Again if you are selected there will be two trials possibly. The first trial will be strictly as to the guilt or innocence of the Defendant. If the jury unanimously decides that Robert Sawyer did in fact commit first degree murder of Frances Arwood there will be another trial and that trial will be the penalty phase of the proceedings and the jury and the jury alone will decide the penalty appropriate in this case. There are only two penalties, life imprisonment or death in the electric chair.
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> Appendix C-9.

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[8]Excerpts from the voir dire for each juror selected for Robert Sawyer's jury are reprinted in Appendix C.

In addition to this information being explicitly communicated to each juror individually, the individual voir dire implicitly told each juror of the seriousness of the proceedings and their responsibilities.

In his opening statement, the prosecutor told the jury that "an opening statement in and of itself like closing arguments are not evidence." Appendix B-1. Also, during the opening statements the court told the jury that "Mr. Boudousque's opening statement is not evidence nor testimony and neither is Mr. Weidner's. These arguments are not evidence and not testimony." Appendix B-1.

In its closing argument at the guilt phase the State told the jury that ". . . you are then going to have to make some serious decisions and that's not easy but that is what the criminal justice system is all about and that is what a jury is all about. . . ." Appendix B-1.

At the close of the guilt phase the court gave the following instructions:

> If you find the accused guilty of first degree murder, then you the jury will have to meet again, and determine the proper punishment. You would then consider the circumstances of the offense and the character and propensities of the offender, and other mitigating factors, and determine if the death sentence should be imposed, or if the defendant should be imprisoned for life, without benefit of probation, parole or suspension of sentence.
>
> Appendix B-1.

The jury was also instructed that "arguments are not evidence," Appendix B-1, that they were "to decide this case fairly and impartially, without fear or favor, and without passion or prejudice" and that "You, as jurors, bear the responsibility of deciding the case." Appendix B-2.

After deliberating for almost three hours the jury returned the unanimous verdict of guilty as charged. The jury was then told that it had to determine what penalty to impose. Before beginning the penalty phase the court instructed the jury:

> Ladies and gentlemen, this phase of the trial is what is called a sentencing hearing. The jury in a capital case is given the authority to make a binding recommendation to the trial judge as to the sentence that should be imposed. You now have the duty to recommend whether the defendant shall be sentenced to death or to life imprisonment without benefit of probation, parole or suspension of sentence. [Emphasis added.]
>
> J.A. 5.

After the presentation of witnesses the arguments began. J.A. 5. The complete text of the closing arguments appear in the Joint Appendix. Besides making the complained of comments, other comments that the prosecutor made should not go unnoticed or unacknowledged. He told the jury ". . . that the sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exist and after consideration (sic) any mitigating circumstances recommends the sentence of death be imposed." Id., p. 6. He also stated that ". . . you cannot deny, it is a difficult decision. No one likes to make those type of decisions but you have to realize if but for this man's actions,

but for the type of life that he has decided to live, if of his own free choosing, I wouldn't be here presenting evidence and making argument to you. You wouldn't have to make the decision." Id., p. 7. They were also told that "The decision is in your hands." Id., p. 8.

In his argument, Sawyer's attorney told the jury:

> The decision whether Robert Sawyer lives or dies is in your hands. . . . Should you decide today that he gets life imprisonment, well then the issue of whether or not he would be executed never comes up again. The issue remains a life (sic) only if you decide that he should be executed. . . . Don't kill.

J.A. 10.

In his rebuttal argument the prosecutor, inter alia, acknowledged to the jury that its decision would be difficult or unpleasant. Id., p. 13.

At the conclusion of the argument the court again instructed the jury on the penalty that it had to determine: life imprisonment or death by electrocution.

The jury was instructed:

> Having found Robert Sawyer guilty of first degree murder you must now determine whether he should be sentenced to death or to life imprisonment without benefit of probation, parole or suspension of sentence.
>
> * * * *

> Before you decide that a sentence of death should be imposed you must unanimously find beyond a reasonable doubt that at least one statutory aggravating circumstance exist. . . . Even if you find the existence of an aggravating circumstance you must also consider any mitigating circumstances before you decide a sentence of death should be imposed.
>
> * * * *
>
> The first formal verdict reads having found the below listed statutory aggravating circumstance or circumstances and after consideration of the mitigating circumstances offered, the jury recommends that the defendant be sentenced to death. In the event you should unanimously decide the death penalty should be imposed, a space is provided for you to write out the statutory circumstance or circumstances unanimously found to exist. ... It is your responsibility in accordance with the principles of law I have instructed whether the defendant should be sentenced to death or the life imprisonment. (Emphasis added.)

J.A. 13-16.

Respondent submits that the jury could not have been misled on this record. There is no reason to believe that Sawyer's jury did not view its "task as the serious one of determining whether a specific human being should die at the

hands of the State." Caldwell, at 329. Caldwell speaks of "the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others. . . ." Id. at 333. As shown above, any improper comments were corrected. They were corrected by other comments of the prosecutor, defense counsel and, most importantly, by the court's comments and instructions.

Sawyer's reliance on Caldwell's statement that "even if the prosecutor's later comments did leave the jury with the view that they had an important role to play, the prosecutor did not retract, or even undermine, his previous insistence that the jury's determination of the appropriateness of death would be reviewed by the appellate court to assure its correctness" Id., at 340-341 n. 7, is misplaced because the facts of Caldwell are distinguishable from those herein. Unlike the misleading comments in Caldwell, these comments, even if not retracted by the prosecutor, were certainly undermined by his comments on the serious role and duty of the jury made in the initial individual voir dire and in his comments which contradicted those at issue herein. Certainly Sawyer's prosecutor's comments, unlike those in Caldwell where the jury was expressly told that "your decision is not the final decision . . . your job is reviewable," Id. at 325, cannot be characterized as an "insistence".

This is evident when realizing that, as shown above, (1) the issue is not whether "bad argument" or improper comments were made, but whether the jury was misled, (2) the comments are to be considered in context, and (3) concomitantly, the court's instructions carry greater weight with the jury than do counsel's arguments. "Arguments of counsel generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence, and are likely viewed as the statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of the law . . . they (arguments) are not to be judged as having the same

force as an instruction from the court. And the arguments of counsel, like the instructions of the court, must be judged in the context in which they are made." Boyde, at 4305. Respondent, supported by this Court's decisions, disputes Sawyer's assertion that Caldwell precludes correcting improper prosecutorial comments with other prosecutorial comments, jury instructions and judge's comments, and that Caldwell error occurred herein.

The distinction between improper comments and a Caldwell violation is an important one and this Court should not equate the two because, by definition, they are two different things: improper argument does not equal Caldwell error. It bears repeating: the issue is not whether improper comments were made but whether the jury was misled. Further distinguishing Caldwell error from the comments made herein are that the comments in Sawyer's case cannot be characterized as "quite focused, unambiguous, and strong" as they were in Caldwell, supra, at 340. Sawyer's jurors, unlike Caldwell's, were never told that they were not the final decision makers. The prosecutor's reference to the courts was part of a general statement that included the trial court and the people of the parish and was intended to emphasize the jurors' roles as a unit. The reference to the courts was ambiguous and, unlike in Caldwell, made no mention of appellate review. The prosecutor's remark at issue here, that the jury's verdict would be a recommendation was an accurate statement of the law. See La.C.Cr.P. art. 905.6 and 905.8. Appendix A-1. Any notion that the use of the word "recommendation" was misleading is disabused by the record. The jury was instructed that its recommendation was a binding one. J.A. 5. In context, the reference to "all the judges that are going to review this case. . . and to any other court that reviews Robert Sawyer's case," J.A. 9, 13, does not violate Caldwell because, in context, they are only part of an argument centered on the community which the jury represents and because a sentence of death would be telling that community that this crime should be punished to the full extent of the law

and that the jury has the courage of its convictions. None of the argument was inaccurate or misleading. Any doubt about this should be resolved against such a conclusion because of the repeated references telling the jury what its responsibility was.

It is a misstatement of law, therefore, for Sawyer to contend (1) that improper argument equals Caldwell error and (2) that improper argument cannot be corrected by, inter alia, jury instructions. It needs no citation to acknowledge the important role played by jury instructions in a criminal trial. It is error, therefore, for Sawyer to shrug off correct jury instructions binding on the jury as merely "boilerplate" instructions which can be ignored. Boyde's pronouncements on jury instructions are, again, equally applicable to the argument at issue herein: "Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting." Boyde, at 4304.

B. A "fundamental fairness" analysis is proper under Caldwell and within the context of the Fifth Circuit's "no effect" test.

As an adjunct to the determination of whether a Caldwell violation occurred, the standard of reviewing a Caldwell violation, if established, must also be addressed. Caldwell, at 340, stated that "such comments, if left uncorrected, might so affect the fundamental fairness of the sentencing proceeding as to violate the Eighth Amendment." Although Caldwell also states that "Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires,"

the "fundamental fairness" standard is firmly established in this Court's jurisprudence.

In Donnelly v. DeChristoforo, supra, this Court granted certiorari "to consider whether such remarks, in the context of the entire trial, were sufficiently prejudicial to violate respondent's due process rights." This Court stated that its review was the narrow one of due process, and not the broad exercise of supervisory power that it would possess in regard to its own trial court. Id., at 642. This was "important for not every trial error or infirmity which might call for application of supervisory powers correspondingly constitutes a 'failure to observe that fundamental fairness essential to the very concept of justice.'" Id. Viewing the complained of comments in context this Court concluded that they did not make "respondent's trial so fundamentally unfair as to deny him due process." Id., p. 645. This Court, in reinstating the conviction in Donnelly, at 647, 648, said that to not do so would render "virtually meaningless the distinction between ordinary trial error of a prosecutor and that sort of egregious misconduct held in Miller and Brady, supra, to amount to a denial of constitutional due process." This judgment maintained that the distinction should continue to be observed.

Similar support for this contention is found in Hopkinson v. Shillinger, 888 F.2d 1286, 1293, 1294 (10th Cir. 1989) (en banc). The Tenth Circuit concluded that this Court did not adopt a "no effect" test for Caldwell error because it would be impossible for a reviewing court to say that a remark that violates Caldwell had no conceivable effect on a sentencing decision. Such a standard would amount to a per se rule requiring reversal which this Court has not erected. The court noted that Caldwell employed a "fundamental fairness" analysis before using the "no effect" phrase. This Court's language in two other cases included "no effect" without suggesting it was a per se standard requiring reversal. Skipper v. South Carolina, 476 U.S. 1 (1986); Franklin v. Lynaugh, 487 U.S. 164 (1988) (O'Connor, J., concurring). The Tenth Circuit agreed

with other cases of this Court addressing Eighth Amendment issues, including concurring and dissenting opinions, which have relied on standards which permit the exercise of some degree of judgment on appellate review.

The Eleventh Circuit in Tucker v. Kemp, 802 F.2d 1293, 1295-1296 (11th Cir. 1986) (en banc), cert. denied 480 U.S. 911 (1987), also used a fundamental fairness approach derived from the prejudice prong of Strickland v. Washington, 466 U.S. 668 (1984). In Tucker the prosecutor made several improper comments at the sentencing phase of Tucker's trial. On remand the court found that the comments, when viewed in light of the entire record, did not constitute Caldwell violations. Referring to Darden v. Wainwright, supra, the Tucker court found that Darden reiterated that the standard in a habeas case for assessing improper prosecutorial comment is, as initially enunciated in Donnelly v. DeChristoforo, supra, whether the proceeding at issue was rendered fundamentally unfair by the improper argument. When it used the prejudice prong of Strickland v. Washington, supra, for its analysis the Eleventh Circuit asked whether there was a reasonable probability that, in the absence of the offending remarks, the sentencing outcome would have been different. The court concluded that this standard properly describes the fundamental fairness inquiry--whether the improper remarks were of sufficient magnitude to undermine confidence in the jury's decision. Tucker, at 1296.

The standard of review for alleged improper remarks as found in this Court's jurisprudence, as well as the Federal Appellate Courts', is a "fundamental fairness" inquiry with variations of language. Even this Court's use of "no effect" language in Skipper and Franklin is altered by further language which denies a "per se" rule. Furthermore, the "fundamental fairness" analysis is incorporated into the Fifth Circuit's "no effect" test such that it is not a "per se" rule.

C. Application of the harmless error doctrine, if Caldwell error is found, will not result in a new sentencing hearing because any error was harmless beyond a reasonable doubt since it did not contribute to the sentence imposed.

The inquiry is not ended should this Court find that Caldwell error occurred since application of the harmless error doctrine will leave the sentence intact. This conclusion is supported by Sawyer's brief and by this Court's jurisprudence including Caldwell. In brief Sawyer writes "the Court in Caldwell placed the burden on the state to show the harmlessness of any such error." (Brief, 38). This Court has previously applied the harmless error doctrine in capital cases. Satterwhite v. Texas, 486 U.S. ____, 108 S.Ct. 1792 (1988), and Gilbert v. California, 388 U.S. 263 (1967). See also Zant v. Stephens, 462 U.S. 862 (1983), which stated that ". . . not every imperfection in the deliberative process is sufficient, even in a capital case, to set aside a state-court judgment. . . ." Id. 885, and that ". . . any possible impact cannot fairly be regarded as a constitutional defect in the sentencing process." Id. 889. This Court in Caldwell also referred implicitly to the harmless error doctrine when it spoke of "evaluating the prejudicial effect of the prosecutor's argument. . . ." Caldwell, at 332. It further addressed the harmless error doctrine in Rose v. Clark, 478 U.S. 570 (1986):

> "The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence; United States v. Nobles, 422 U.S. 225, 230 [95 S.Ct. 2610, 2166, 45 L.Ed.2d 141] (1975), and promotes public respect for the criminal process by focusing on the underlying fairness of the trial

> rather than on the virtually inevitable presence of immaterial error. Cf. R. Traynor, The Riddle of Harmless Error 50 (1970) ('Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.')." Delaware v. Van Arsdall, supra, 475 U.S. at 681.

Rose v. Clark, at 577.

In determining whether error requires reversal or can be considered harmless the court in Rose also stated that Chapman v. California, 386 U.S. 18 (1967) "mandates consideration of the entire record prior to reversing a conviction for constitutional errors that may be harmless. . . . The question is whether 'on the whole record . . . the error . . .[is] harmless beyond a reasonable doubt." Id. 583. Respondent submits that for the same reasons that no Caldwell violation occurred that, if this Court finds it did occur, it was harmless and can serve as no basis to vacate Sawyer's sentence. Respondent submits that on this record it can be said beyond a reasonable doubt that the complained of comments did not contribute to the sentence obtained. Rose, at 578. Robert Sawyer received his constitutional right to a fair trial. It is well to remember, as stated by this Court in 1972, that "The writ of habeas corpus has limited scope; the federal courts do not sit to re-try state cases de novo but, rather, to review for violation of federal constitutional standards." Milton v. Wainwright, 407 U.S. 371, 377 (1972). It should also be borne in mind that relief is not warranted "where the claimed error amounts to no more than speculation." Boyde, 4304. Nor is it warranted "simply by demonstrating that an alleged trial-related error could or might have affected the jury." Id., n. 4. As all Sawyer has presented to this Court is speculation, he is entitled to no relief.

CONCLUSION

The judgment below should be affirmed since Caldwell issued a "new rule" of law that cannot be retroactively applied to Sawyer's case. Furthermore, the Caldwell rule does not fit within either of the two exceptions and, thus, is not available to Sawyer. Nevertheless, when the remarks complained of in Sawyer are viewed within the context of the entire trial, they do not diminish the jury's sense of responsibility in violation of the Eighth Amendment.

Respectfully Submitted,

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APPENDIX

APPENDIX "A"

Art. 905.6. Jury; unanimous recommendation

A sentence of death shall be imposed only upon the unanimous recommendation of the jury. If the jury unanimously finds the sentence of death inappropriate, it shall recommend a sentence of life imprisonment without benefit of probation, parole or suspension of sentence.

Added by Acts 1976, No. 694. § 1.

Art. 905.8 Imposition of sentence

The court shall sentence the defendant in accordance with the recommendation of the jury. If the jury is unable to unanimously agree on a recommendation, the court shall impose a sentence of life imprisonment without benefit of probation, parole or suspension of sentence.

Added by Acts 1976, No. 694, § 1.

Art. 905.9. Review on Appeal

The Supreme Court of Louisiana shall review every sentence of death to determine if it is excessive. The court by rules shall establish such procedures as are necessary to satisfy constitutional criteria for review.

Added by Acts 1976, No 694, § 1.

RULE XXVIII. CAPITAL SENTENCE REVIEW

Rule 905.9.1 (applicable to La.C.Cr.P. Art. 905.9)

Section 1. Review Guidelines. Every sentence of death shall be reviewed by this court to determine if it is excessive. In determining whether the sentence is excessive the court shall determine:

(a) whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors, and

(b) whether the evidence supports the jury's finding of a statutory aggravating circumstance, and

(c) whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Section 2. Transcript, Record. Whenever the death penalty is imposed a verbatim transcript of the sentencing hearing, along with the record required on appeal, if any, shall be transmitted to the court within the time and the form, insofar as applicable, for transmitting the record for appeal.

Section 3. Uniform Capital Sentence Report; Sentence Investigation Report.

(a) Whenever the death penalty is imposed, the trial judge shall expeditiously complete and file in the record a Uniform Capital Sentence Report (see Appendix "B"). The trial court may call upon the district attorney, defense counsel and the department of probation and parole of the Department of Corrections to provide any information needed to complete the report.

(b) The trial judge shall cause a sentence investigation to be conducted and the report to be attached to the uniform capital sentence report. The investigation shall inquire into the defendant's prior delinquent and criminal activity, family situation and background, education, economic and employment status, and any other relevant matters concerning the defendant. This report shall be sealed, except as provided below.

(c) Defense counsel and the district attorney shall be furnished a copy of the completed Capital Sentence Report and of the sentence investigation report, and shall be afforded

seven days to file a written opposition to their factual contents. If the opposition shows sufficient grounds, the court shall conduct a contradictory hearing to resolve any substantial factual issues raised by the reports. In all cases, the opposition, if any, shall be attached to the reports.

(d) The preparation and lodging of the record for appeal shall not be delayed pending completion of the Uniform Capital Sentence Report.

Section 4. Sentence Review Memoranda; Form; Time for Filing.

(a) In addition to the briefs required on the appeal of the guilt-determination trial, the district attorney and the defendant shall file sentence review memoranda addressed to the propriety of the sentence. The form shall conform, insofar as applicable, to that required for briefs.

(b) The district attorney shall file the memorandum on behalf of the state within the time provided for the defendant to file his brief on the appeal. The memorandum shall include:

i. a list of each first degree murder case in the district in which sentence was imposed after January 1, 1976. The list shall include the docket number, caption, crime convicted, sentence actually imposed and a synopsis of the facts in the record concerning the crime and the defendant.

ii. a synopsis of the facts in the record concerning the crime and the defendant in the instant case.

iii. any other matter relating to the guidelines in Section 1.

(c) Defense counsel shall file a memorandum on behalf of the defendant within the time for the state to file its brief on the appeal. The memorandum shall address itself to the state's memorandum and any other matter relative to the guidelines in Section 1.

Section 5. Remand for Expansion of the Record. The court may remand the matter for the development of facts relating to whether the sentence is excessive.

Added Nov. 22, 1977, effective Jan. 1, 1978.

APPENDIX "B"

Excerpt From The Opening Statements

MR. BOUDOUSQUE:

May it please the Court and Counsel for the Defendant and more importantly ladies and gentlemen of the jury. We are at the phase of the proceedings known as an opening statement. An opening statement in and of itself like closing arguments are not evidence.

* * * *

(R. 1057).

THE COURT:

The Court overrules that objection. Go ahead. Let the Court advise the jury, Mr. Boudousque's opening statement is not evidence nor testimony and neither is Mr. Weidner's. These arguments are not evidence and not testimony.
(R. 1073).

Excerpt From The State's Closing Argument

. . .you are then going to have to make some serious decisions and that's not easy but that is what the criminal justice system is all about and that is what a jury is all about so again I thank you.
(R. 1431).

Excerpt From Jury Instructions At Guilt Phase

If you return a verdict of guilty of second degree murder or manslaughter, the Court, not the jury, will impose sentence. If you return a verdict of not guilty, the accused will be discharged.

If you find the accused guilty of first degree murder, then you the jury will have to meet again, and determine the proper punishment. You would then consider the circumstances of the offense and the character and propensities of the offender, and other mitigating factors, and determine if the death sentence should be imposed, or if the defendant should be imprisoned for life, without benefit of probation, parole or suspension of sentence.

* * * *

While the defense is not required by law to make an opening statement, in this case Mr. Weidner did make such a statement. The same rules apply to this statement as to the District Attorney's opening statement. These statements are not proof, and please don't consider them as such.

You should carefully consider the closing arguments of counsel insofar as such arguments will assist you in arriving at a just verdict, but the closing arguments are not evidence. You are to draw your own conclusions, based on the evidence and the testimony you have heard.

* * * *

You are to decide this case fairly and impartially, without fear or favor, and without passion or prejudice. . . . You, as jurors, bear the responsibility of deciding the case.

(R. 1452-1454, 1457, 1458).

APPENDIX "C"

Selected Excerpts From Voir Dire

VICTOR CYPRIEN RAGAS was called as a prospective juror and after first being duly sworn was examined and testified as follows:

* * * *

Q. Now if in fact you are selected as a juror and that jury does find Robert Sawyer guilty of first degree murder, the jury will come back, the same jury. There will be another trial with possibly other evidence introduced to determine the penalty the Defendant is to obtain. That penalty would be mandatory life imprisonment without probation, parole, or suspension of sentence. Mandatory life imprisonment does not speak of commutation, pardon, or good time or he could possibly receive death in the electric chair. What are your feelings about capital punishment.

A. I have never really given it any thought because I have nothing against it.

(R. 492)

LAURA TROTTER ROTH was called as a prospective juror and after first being administered the oath of voir dire was examined and testified as follows:

* * * *

Q. Now if you are selected to serve as a juror and that jury does in fact find that the Defendant is guilty of the crime of first degree murder there will be a second trial. The same jury. Same case. It might be some additional evidence presented. At that trial and only after the jury has found unanimously he is guilty of first degree murder,

the jury will have to decide based on the evidence presented whether they will cast their vote for the death penalty or whether the man shall serve the rest of his life in prison without benefit of parole, probation or suspension of sentence. Now parole, probation or suspension of sentence does not mean good time, commutation or pardon. You follow what I am saying. Certain things you ahave (sic) to understand here. If you do not understand the subtle distinction let me know and I will explain them to you better. Don't be nervous. What are your feelings about the death penalty?

A. I believe that the death penalty is justifiable.

Q. You believe under certain circumstances the evidence may justify the imposition of the death penalty?

A. Right.

* * * *

Q. You can see by now we are talking about quite a serious thing here and you will have to make some serious decisions but that is what justice is all about. Okay, one other thing.

* * * *

(R. 550, 555).

THEODORE GUSTAVE ANDRESSEN was called as a prospective juror and after first being administered the oath of voir dire was examined and testified as follows:

* * * *

Q. Now another important thing relating to the crime of first degree murder, again if the jury and you are on this jury and you heard all the evidence and that jury unanimously decides the Defendant in fact did in fact commit the crime charged, well then you will have another hearing. Once

the jury has found he is guilty of first degree murder you will have another trial with the same jury, same cast of characters, except there will be additional evidence that may be introduced and at that hearing you will make a decision as to whether the Defendant will spend the rest of his life in jail without benefit of parole, probation, or suspension of sentence or be sentenced to die in the electric chair. Now parole, probation, or suspension of sentence does not mean the man will not get good time, does not mean he will not be given a commutation of sentence or pardon by the Governor. Do you understand that. What are your feeling toward capital punishment?

A. I think we should have it.
(R. 570).

KIRK MICHAEL DRUMM was called as a prospective juror and after first being duly sworn on the oath of voir dire was examined and testified as follows:

* * * *

Q. Do you understand the definition of first degree murder. If you are selected to serve as a juror in this matter there will be possibly two trials. The same jury, the same Judge, same other case. The first trial will be solely as to the guilt or innocence of the Defendant as it relates to the crime of first degree murder. If the jury in fact does find unanimously that Robert Sawyer did commit first degree murder of Frances Arwood, there will be a second trial and that second trial will be strictly as to the penalty phase of the proceedings. The jury will make the decision what penalty should apply and in this case based on the facts there is only one penalty under Louisiana law for first degree murder. It is either life imprisonment or death in the electric chair. What are your feelings about capital punishment?

A. I have been going over that for the last week and I cannot come to a definite answer on it.

Q. Do you think there are certain circumstances that the evidence may be so strong and so heinous that you could at least consider the imposition of the death penalty?

A. Yes sir.

* * * *

(R. 652).

RONALD AKERMAN, JR. was called as a prospective juror and after first being administered the oath of voir dire was examined and testified as follows:

* * * *

Q. Now if you are selected to serve as juror in this matter there will be two trials. The first trial will be strictly an evidentiary trial relating to the facts as to the guilt or innocence of the Defendant.

A. Right.

Q. You follow me. You are to be a fact finding body as to whether the man is guilty of first degree murder and if in fact that jury unanimously decides Robert sawyer committed first degree murder of Frances Arwood, there will be another trial with the same jury, same characters and other evidence may or may not be presented at that trial for the purpose of determining the sentence. The jury must unanimously decide at that point in time whether the Defendant would be sentenced to life imprisonment or whether he be sentenced to die in the electric chair. Are you opposed to capital punishment?

A. I am not against it.

Q. Under certain facts and circumstances if you feel the evidence so warrants can you impose the death penalty?

A. I think so.

* * * *

PETER CACIOPPO was called as a prospective juror and after first being administered the oath of voir dire was examined and testified as follows:

* * * *

Q. Now if you are selected to serve as a juror there may be two trials in this case. The first trial will be as to the guilt or innocence of the Defendant. Evidence will be presented strictly as to that fact. If the jury unanimously decides that Robert Sawyer did commit first degree murder of Frances Arwood, there will be a second trial and that second trial there may or may not be other evidence presented but will be strictly as to the penalty phase of the proceedings. What penalty the jury will decide the Defendant will get and the two choices are life imprisonment or death in the electric chair. What are your feelings about capital punishment. If you are just say so now, now is the time to say and don't feel ashamed in your belief one way or the other.

A. I would think that I am not opposed to it.

Q. You are not opposed to the death penalty. Have you ever given it any consideration?

A. Not enough really.

Q. Again if you are selected to serve as a juror there is a real possibility you may have to sit down and make that decision. You will be one of twelve but if and when that decision is made it may have to be made by you and

eleven other people so if you have never thought about it now is the time if you don't think you can tell me, if you think you can tell me also. We are all interested in this question.

A. Let's say whether I do believe in the death penalty.

Q. Whether you could cast your vote.

A. I probably could.

* * * *

(R. 706).

FRANK ALBERT LEABER, JR. was called as a prospective juror and after first being administered the oath of voir dire was examined and testified as follows:

* * * *

Q. If you were selected to serve as a juror there will possibly be two trials. The first trial will be solely as to the guilt or innocence of the Defendant of the crime of first degree murder of Frances Arwood. If the jury unanimously decides the Defendant is guilty of first degree murder there will be a second trial. The second trial relates exclusively to the sentencing phase of the proceedings. There are only two options related at that point in time, one will be life imprisonment, the other will be execution in the electric chair. What are you feelings about capital punishment. Are you opposed to capital punishment?

A. I'm not opposed to it. I am not against it.

Q. Could you cast a vote in favor of capital punishment if you feel the facts surrounding the crime so warrants?

A. I guess I could.

Q. You could at least consider it?

A. I could consider it.

Q. You realize if it comes to that point in time you will have to cast your vote one way or the other.

A. Yes.

* * * *

(R. 774).

MITCHELL VANCE POLLACK was sworn as a prospective juror and after first being administered the oath of voir dire was examined and testified as follows:

* * * *

Q. If you were selected to serve as a juror there is a possibility of two trials. The first trial will be merely as to the guilt or innocence of the Defendant based on evidence presented. If the jury unanimously decides Robert Sawyer did in fact commit first degree murder of Frances Arwood, there will be a second trial. The same jury, same judge, and the same other cast of characters but that trial will relate exclusively to the penalty phase of the proceedings. The jury at that point in time will decide what penalty will be given to the Defendant.

A. Yes.

Q. At that trial there may or may not be other evidence introduced in support of the penalties. The two penalties are either, you know, one or the other. It's life imprisonment or death in the electric chair. What are your feelings about capital punishment? Are you opposed to capital punishment?

A. No.

Q. There are times when you can consider the death penalty may be necessary in certain types of crimes?

A. That is true.
(R. 792).

SUSAN B. ROUNDTREE was called as a prospective juror and after first being administered the oath of voir dire was examined and testified as follows:

* * * *

Q. Now Mrs. Roundtree, as I told you the Defendant has been indicted by way of Grand Jury with the crime of first degree murder. Under the law of Louisiana if you are selected to serve as a juror there may be two possible trials that you will have to participate in. The first trial will be solely as to the guilt or innocence of the Defendant for the crime of first degree murder of Frances Arwood. If in fact jury unanimously returns a verdict that the Defendant is guilty of the crime of first degree murder there will be a second trial where the jury will decide what penalty will be appropriate to the crime charged. There may or may not be other evidence produced at the second part of it and that will be solely relating to the penalties. There are two possible penalties and only two possible penalties for first degree murder, life imprisonment or death in the electric chair. Are you opposed to capital punishment?

A. No.

Q. Do you feel from evidence there are certain types of crimes that may be so shocking or so heinous that the imposition of the death penalty may be well justified or warranted, do you not?

A. Yes.

Q. But you understand that decision will be made by the jury as a whole and it must be a unanimous decision of the entire jury before they would come to that conclusion.

A. Right.

* * * *

(R. 835, 836)

ELM D. WOOD, JR. was called as a prospective juror and after first being administered the oath of voir dire was examined and testified as follows:

* * * *

Q. Again if you are selected there will be two trials possibly. The first trial will be strictly as to the guilt or innocence of the Defendant. If the jury unanimously decides that Robert Sawyer did in fact commit first degree murder of Frances Arwood there will be another trial and that trial will be the penalty phase of the proceedings and the jury and the jury alone will decide the penalty appropriate in this case. There are only two penalties, life imprisonment or death in the electric chair. Are you opposed to capital punishment?

A. No I am not.
(R. 867).

MS. DEBORAH DUNN, was called as a prospective juror and after first being administered the oath of voir dire was examined and testified as follows:

* * * *

Q. Great. Now, my second and very most important question is that there will probably be two trials. In a first-degree murder case, the first trial will be solely as to the guilt or innocence of the Defendant. If the jury unanimously

finds, if all twelve of you find that Robert Sawyer did in fact commit first-degree murder of Frances R. Wood (sic) on September 28th of last year, then there will be a second trial and that second trial the jury will decide what the penalty will be for the Defendant. There are only two choices. It's either or the first choice is life imprisonment or the second choice is death in the electric chair. And, the jury must unanimously decide what is the appropriate penalty according to the facts that are presented in the case. Now, during the second trial there may or may not be other evidence introduced to substantiate a life imprisonment or death in the electric chair, but that will be reached only after the first trial is conclued (sic). My question, then is: What are your feelings about capital punishment? Are you opposed to capital punishment?

A. No, I'm not.

Q. Do you feel in certain factual circumstances if the evidence so warrant that it may be justified?

A. Yes, I do.
(R. 947, 948).

ELOISE S. GUSMAN, was called as a prospective juror and after first being administered the oath of voir dire was examined and testified as follows:

* * * *

Q. In any event my next question is if you were selected to serve there is a possibility there will be two trials. If you don't understand the nature of my questions or I'm going too quickly for you stop me, now is the time. There will be two trials, the first trial will be strictly as to the guilt or innocence of the Defendant on the crime of first degree murder. The jury unanimously decides Robert Sawyer did

commit first degree murder of Frances Arwood there will be another trial and that trial will be relating strictly to the penalty phase of the proceedings. The jury will decide the penalty phase. There may or may not be other evidence presented at that trial. There may be evidence that is different from the first trial. The penalty in Louisiana for first degree murder is life imprisonment or death in the electric chair. Are you opposed to capital punishment?

A. No I am not.

* * * *

(R. 1011).